No. 22,565

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC CAR AND FOUNDRY COMPANY,
Petitioner,

vs.

HONORABLE MARTIN PENCE, United States District Judge, District of Hawaii, and L. C. O'NEIL TRUCKS PTY. LIMITED,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

JOSEPH L. ALIOTO,

MAXWELL M. BLECHER,

111 Sutter Street,

San Francisco, California 94104,

DAMON, SHIGEKANE & CHAR,

VERNON F. L. CHAR,

333 Queen Street, Honolulu, Hawaii,

Attorneys for Respondents L. C. O'Neil Trucks Pty. Limited, Real Party in Interest, and by Special Designation for Honorable Martin Pence, United States District Judge, District of Hawaii.

Of Counsel:

MARQUIS JACKSON,

32-34 Bridge Street, Sydney, Australia.

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I

STATEMENT OF THE CASE

Respondent L. C. O'Neil Trucks Pty. Limited (hereinafter O'Neil) is an Australian corporation which, during its active existence, was engaged in the business of selling trucks manufactured by petitioner Pacific Car and Foundry Company (hereinafter PCF).

On August 31, 1967 O'Neil filed a complaint in the United States District Court in Honolulu charging PCF with violations of Sections 1 and 2 of the Sherman Act. (15 U.S.C. 1, 2.) The complaint alleges that PCF acquired the Kenworth Motor Truck Company in 1945;

acquired the Peterbilt Motor Company in 1958; that both Kenworth and Peterbilt produce heavy duty trucks which are substantially identical, and that the Peterbilt and Kenworth divisions of PCF operate independently and actually compete with each other. The complaint alleges that O'Neil was formed for the purpose of selling Peterbilt trucks produced by PCF and that it performed this function from mid-1963 through the end of 1965, when it was appointed a Kenworth distributor by PCF. The complaint alleges that this appointment was terminated in early 1967.

The complaint then charges—with an unusual degree of specificity for an antitrust case—that PCF, by conspiring with a distributor-competitor of O'Neil to eliminate the latter from the business of distributing heavy duty trucks in Australia, violated Section 1 of the Sherman Act. The complaint also alleges that PCF, acting unilaterally, engaged in a purposeful plan and program to monopolize the export of heavy duty trucks from the United States to Australia in violation of Section 2 of the Sherman Act and that its manipulation and ultimate termination of O'Neil constituted part of that plan and program. O'Neil alleges damages in the amount of $2,750,000.

In October 1967, PCF moved to dismiss or transfer the action to the Western District of Washington (pursuant to 28 U.S.C. 1406(a)) or, in the alternative, to transfer the action to the United States District Court for the Western District of Washington (pursuant to 28 U.S.C. 1404(a)). (R. 23-45.) PCF urged, in support of these motions, that (1) it was neither found nor transacting business in the State of Hawaii, and, *arguendo*

(2) that the District of Hawaii was an inconvenient forum in which to litigate this action.

On December 26, 1967, the District Court (Chief Judge Martin Pence, Respondent herein) filed an "Order Denying Defendant's Motions to Quash Return of Summons, to Dismiss or Transfer Pursuant to 28 U.S.C. 1406(a), and for Change of Venue Under 1404(a)". (R. 106-113.)

On February 21, 1968, this Court granted leave to review this ruling by petition for a writ of mandamus.

Substantial discovery has taken place. Pursuant to a stipulated Pre-Trial Order No. 1 (appended hereto as Exhibit A), both sides have produced considerable books, files and records for inspection and copying by the other. Plaintiff has voluntarily produced two of its key officers in Seattle for the taking of their depositions (agreed to be concluded in Australia). Plaintiff has taken the depositions of two of the highest PCF officials involved in the activities challenged in the lawsuit.

In late January 1968, prior to filing of the petition herein, O'Neil filed (1) proposed Pre-Trial Orders Nos. 2 and 3 designed to guide the balance of discovery, establish a "cut-off" date for discovery and fix a trial date (suggested for December 1968), (2) a second Motion to Produce under Rule 34, (3) First Set of Interrogatories, and (4) Notice of Taking Depositions, consisting of one deponent in Hawaii, two in Australia and three in Seattle.[1]

All of the discovery recited hereinabove took place *after* the Court had denied defendant's motion to quash return

[1]These documents are appended hereto as Exhibits B-E for such consideration as the Court may choose to give them.

of summons, dismiss for lack of venue, or transfer to Seattle. (R. 43-45.)

II

APPLICABLE STATUTES

Section 1 of the Sherman Act (15 U.S.C. 1) provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Section 2 of the Sherman Act (15 U.S.C. 2) provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Section 4 of the Clayton Act (15 U.S.C. 15) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 12 of the Clayton Act (15 U.S.C. 22) provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not

only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

28 U.S.C. 1404 provides:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

28 U.S.C. 1406:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.

III

ISSUES PRESENTED

1. Is mandamus an appropriate remedy to review a district court ruling denying motions to dismiss and quash service for lack of venue, where the ruling is made upon the lower court's findings of fact that defendant "transacts business" within the forum?

2. Assuming, *arguendo,* that mandamus is an appropriate method for reviewing such a ruling, should this Court, in the exercise of its discretion, issue mandamus where the totality of the facts persuasively demonstrates that defendant has sufficient contact with the district as to make it reasonable, in a constitutional sense, that it defend the lawsuit in the chosen forum?

3. In light of the federal policy facilitating the litigation of antitrust claims in the plaintiff's chosen forum, did the court below abuse its discretion in denying petitioner's motions for transfer by holding that petitioner had not demonstrated that the interest of justice would be served by transfer, particularly where plaintiff was an Australian corporation which had chosen the forum closest to its domicile and place of business?

IV

MANDAMUS IS NOT AN APPROPRIATE MEANS OF REVIEWING THE DENIAL OF A MOTION TO DISMISS OR QUASH BASED ON LACK OF VENUE WHERE THE DENIAL RESTS UPON FACTUAL DETERMINATIONS

This Court pointed out in *American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co.,* 331 F.2d 706, 709 (9th Cir. 1964), that the granting of leave to file an application for a writ of mandamus does not preclude the respondent from urging that mandamus is an inappropriate remedy. Nor does it preclude this Court from making such a determination after granting leave to file.

In *Will v. United States,* 88 S. Ct. 269 (1967), the Supreme Court of the United States said that "the party seeking mandamus has the burden of showing that its right to issuance of the writ is 'clear and indisputable' ". (88 S. Ct. at 274.) Holding that mandamus was erroneously granted by the Court of Appeals, the Court said:

> "Thus the most that can be claimed on this record is that [the District Judge] may have erred in ruling on matters within his jurisdiction * * * But the extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. Mandamus, it must be remembered, does not run the gauntlet of reversible errors * * * Its office is not to control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power". (88 S. Ct. at 278.)

Mandamus is not an appropriate method of reviewing denial of the dismissal motion. In *Bankers' Life & Casu-*

alty Co. v. Holland, 346 U.S. 379, 74 S. Ct. 185 (1953), the Court said that mandamus is ". . . meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' . . .". (346 U.S. at p. 383.) Here, we submit, there is neither abuse of discretion nor usurpation of judicial power.

In *American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co.,* this Court said "we will *assume* that, under this statute, [28 U.S.C. 1651(a)] we have power to review by mandamus a district court order denying, without prejudice, motions to dismiss a complaint for lack of venue and personal jurisdiction, and denying without prejudice a motion to quash service. (331 F.2d at 709; emphasis added.)

In the *No-Joint* case, the district court order which this Court agreed to review by mandamus—and as to which it subsequently denied relief—denied the dismissal motion for two reasons. The first was based upon this Court's ruling in *Guisti v. Pyrotechnic Industries, Inc.,* 156 F.2d 351 (9th Cir. 1946) which held that a foreign corporation not otherwise doing business in California, transacts business in California through the acts of co-conspirators so that the foreign corporation is subject to suit under the antitrust laws in California. The alternative ground on which the lower court in *No-Joint* denied the motion to dismiss was that, apart from the *Guisti* case, the plaintiff's affidavits (without benefit of discovery) outlined the "business transacted" in California to an extent that the lower Court held that plaintiff should have an opportunity to establish *as a fact* that the moving defendant did transact such business.

In denying mandamus, this Court said that it was unnecessary to review the propriety of the *Guisti* rationale because the *fact* issues regarding venue have not yet been resolved and "were not ripe for review at this time". (331 F.2d at 710.) This Court said that

> "When the facts are developed in the evidence and *found by the court,* it may turn out that this basis for venue is adequate. It follows that consideration of the *Guisti* phase of the venue question is premature and may even become moot". (331 F.2d at 710; emphasis added.)

We read this decision as indicating that this Court granted leave to file the mandamus petition to review what appeared to be "the scope of an important federal statute and the interpretation of a prior opinion of this Court [Guisti] as to which there is a direct conflict among the judges of the district court". (331 F.2d at 709.) Finding that resolution of that question was not necessary, this Court suggested that it would not review by mandamus a ruling based on facts "found by the court" that venue was properly laid.

In connection with the denial of the motions to dismiss and quash, we have only the lower court's application to the facts of this case of the standards set out in *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders & Exhibitors Assn.,* 341 F.2d 860 (9th Cir. 1965). To the extent that the district court's opinion explains the relationship of the holding in *Courtesy Chevrolet* to this Court's prior decision in *L. C. Reeder Contractors of Arizona v. Higgins Industries, Inc.,* 265 F.2d 768 (9th Cir. 1959), it involves an *explanation* which is, we submit,

sufficiently clear and discernible from the *Courtesy Chevrolet* opinion itself. Certainly there is no conflict on this question among judges of district courts within this Circuit adequate to warrant review of the decision below by extraordinary writ. Accordingly, respondent urges denial of the writ so far as it seeks review of the rulings on the motions to dismiss and quash for lack of venue on the threshold ground that, in the circumstances presented, mandamus is not an appropriate remedy and should not issue.

V

SUMMARY OF ARGUMENT

Assuming, *arguendo,* the Court concludes that mandamus may be used to review factual determinations on the basis of which a district court denies motions to dismiss and quash for lack of venue, we submit that here Judge Pence's findings are amply supported by the record and in no way involve an abuse of discretion or usurpation of judicial power.

We recognize that mandamus is now regarded as an appropriate means of reviewing orders denying transfer motions, but submit that here Judge Pence carefully considered all of the equities, balanced them against appropriate and well recognized legal standards and properly concluded that transfer was not in the interest of justice.

A. Denial of the Motions to Dismiss and Quash Service:

Venue in private antitrust litigation against a corporate defendant lies, *inter alia,* wherever the corporation "transacts business". Congress purposefully gave great

latitude to antitrust plaintiffs in selecting forums so as to facilitate the institution and prosecution of such litigation recognizing it to be an important part of overall antitrust enforcement. This Court, following the mandate of the Supreme Court, has consistently ruled that the antitrust venue statute was to be construed liberally. The legal standard, according to prior decisions of this Court, is whether, in an everyday sense, and considering the "totality of all the facts", the defendant is transacting business within the forum to a degree that it would not be unreasonable—in a constitutional sense—to require it to defend a lawsuit there. And this Court, based on a careful reading of the legislative history, has expressly rejected the notion that venue is limited to the place where the alleged injury was inflicted.

In determining whether more than a constitutionally required minimal contact is found in any given case, the Court must consider all of the facts wholly. Judge Pence on the basis of essentially uncontroverted facts found that petitioner had three distributors based in Hawaii to whom it made sales of trucks, and that these distributors, who were contractually subject to petitioner's control in several important ways, were the conduits through whom petitioner's products were sold in the State of Hawaii. Judge Pence found that during a period of some 16 months at least 6 trips were made by high echelon sales management officials to Hawaii for the purpose of conducting petitioner's business in that State. Judge Pence also found that one of O'Neil's incorporators resided in Hawaii during the period he negotiated with petitioner for the Peterbilt distributorship in Australia and that,

while a resident of Hawaii, he wrote to and received a letter from petitioner in furtherance of those negotiations. Finally, Judge Pence found that petitioner's executives came to Hawaii to discuss with Hawaiian residents the prospect of investment in the Australian-based business of O'Neil.

If it can be said on the basis of this record that it is unreasonable to require petitioner to defend the case in Hawaii because its contacts are too minimal and remote —particularly where the plaintiff cannot sue at its own place of business—then we respectfully submit that this Court will have emasculated its prior and recent rulings according liberality to plaintiffs under the antitrust venue statute. A holding that venue is not established on these facts would permit any manufacturer to evade suit for acts committed in a jurisdiction where it conducts business through independent distributors and would thereby force injured persons to pursue the manufacturer *to its headquarters* there to litigate the grievance. Such an antediluvian notion of antitrust policy would hardly be consistent with the recent rulings of this Court much less the older pronouncements of the Supreme Court. The petition for writ of mandamus as to the denial of the motions to dismiss and quash must be denied.

B. Denial of the Transfer Motions Was Wholly Within the Court's Power and the Exercise of Its Discretion:

A motion for transfer under 28 U.S.C. 1404(a) is addressed to the sound discretion of the District Court.[2]

[2]Under 28 U.S.C. 1406 no discretion is involved except that the Court may, in lieu of dismissing for lack of venue, transfer to an appropriate district if it so elects. Transfer under 1406 depends then on finding venue inappropriately laid.

The burden of establishing that transfer is in the interest of justice is on the moving party and, unless the evidence and circumstances of the case are strongly in favor of the transfer, the plaintiff's choice of forum should not be disturbed. Where the circumstances of each individual case are examined by the Judge in the exercise of his discretion, his determination should not be rejected unless the appellate court can say there has been a *clear* abuse of discretion. Thus, the standard is not what the members of this Court, collectively or individually, would have done had the issue been presented to them in the first instance, but rather whether the District Judge considered all the factors and properly exercised his discretion in the circumstances.

In this context we respectfully suggest that this petition does not present a close question. Each reason advanced by petitioner and the factual averments in support thereof were carefully examined by the District Court who, viewing them cumulatively, found that petitioner had not met its burden of showing that transfer was in the interest of justice. In doing so the District Judge correctly applied the applicable legal principles particularly as they have been interpreted in antitrust cases.

Guided by this Court's pronouncement that the purpose of Section 12 of the Clayton Act was to "provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy",[3] the Court found that plaintiff—an

[3]*Eastland Construction Co. v. Keasbey and Mattison Co.*, 358 F.2d 777, 781 (9th Cir. 1966).

Australian corporation—which could not sue at the site of its alleged injury—had chosen the United States court nearest to Australia.

Petitioner's mechanical listing of every person in its employ having any connection, no matter how remote, with Australia and its arguments about the quantity and location of documents were not persuasive. In making practical judgments about the need for witnesses at trial, the utility of deposition testimony and the accessibility of documents because of modern reproduction methods, the District Judge demonstrated why resolution of such a motion is "peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation". *Lykes Bros. S.S. Co. v. Sugarman,* 272 F.2d 679, 680 (2nd Cir. 1959).

A reading of the Court's memorandum opinion demonstrates that the respondent Judge carefully considered all the equities and balanced the conveniences. In this process he found that defendant had not demonstrated hardship or inconvenience sufficient to justify a finding that the interest of justice required transfer, considered in the light of the additional expense to which the plaintiff would be put were it required to litigate on the mainland.

Nor is there substance in respondent's argument that by use of the words "at this stage of the litigation it is impossible for this court to ascertain with any definitive approximation the burden which defendant may incur", Judge Pence actually deferred ruling on the transfer motion. In the context of the opinion it is apparent that these words do not indicate abstention. Rather than in-

dicating a failure to act, this language cogently demonstrates how a trial judge experienced in antitrust trials need *not* accept *in vacuo* a representation that 56 company employees will be required to appear at trial. Indeed, so doubtful was this proposition in the light of Judge Pence's extensive experience in the trial of antitrust cases that he was warranted in concluding that the recitation was, shall we say, tainted with exaggeration.

Thus the denial of the transfer motion involves no abuse of discretion, much less a "clear" abuse. For this reason it should not be set aside by mandamus.

VI

THE DISTRICT COURT CORRECTLY DECIDED THAT PETITIONER TRANSACTS BUSINESS IN HAWAII

A. Section 12 of the Clayton Act Must Be Liberally Construed.

This Court, speaking through the respondent Judge, in *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders & Exhibitors Assn.,* 344 F.2d 860 (9th Cir. 1965), reversed the dismissal of an antitrust complaint for lack of venue. In doing so, this Court noted the "broad concept and objectives of 15 U.S.C. 22" in holding that "while only one act may be enough to fulfill the venue requirements of the statute, in each case it is the totality of all the facts which determines whether the defendant is doing business, or found, in a district". 344 F.2d at 865. This holding is consistent with the landmark decision of *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945), in that the totality of the contacts

with the forum must be such "as to make it reasonable . . . to require the corporation to defend the particular suit which is brought . . ." in the chosen forum. (344 F.2d at 865.)

Still more recently and more explicitly this Court has pointed out, by reference to the Congressional history, the purpose of 15 U.S.C. 22. In *Eastland Construction Co. v. Keasbey and Mattison Co.,* 358 F.2d 777 (9th Cir. 1966), this Court said that the antitrust venue statute was designed "to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations . . ." of the antitrust laws. 358 F.2d at 781, citing *National City Lines v. United States,* 334 U.S. 573, 581 (1948).

After an exhaustive review of the legislative history and the line of Supreme Court cases construing 15 U.S.C. 22, the Court of Appeals for the District of Columbia in *B. J. Semel Associates, Inc. v. United Fireworks Mfg. Co.,* 355 F.2d 827 (D.C. 1965), said that ". . . the venue statute with which we deal is not generalized in its reach but was intended by Congress to be an important facet in the scheme of private remedies devised to promote the objectives of the antitrust laws". 355 F.2d at 830. The Court went on to say:

> The Supreme Court has pointedly reminded us of the inutility of much of this learning in construing Section 12 of the Clayton Act, and has said that we are, as has it, to seek to make effective "Congress' remedial purpose" in enacting that statute by making "the test of venue" under it a "practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' * * *."

United States v. Scophony Corp., 333 U.S. 795, 807-808, 68 S. Ct. 855, 862, 92 L.Ed. 1091 (1948). The remedial purpose referred to in *Scophony* was clearly that identified by the Court as the relieving of "persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence." 355 F.2d at 831.

B. The District Judge's Findings Are Amply Supported by the Record.

Cognizant, then, of the spirit in which antitrust venue motions were to be tested, the respondent Judge laboriously reviewed the essentially uncontroverted facts presented to him by the parties to determine if the "totality of all the facts" reflected whether in a "practical, everyday business or commercial concept of doing or carrying business of any substantial character" it would be "reasonable . . . to require [petitioner] to defend the particular suit" in Hawaii.

As *part* of this review, the respondent Judge analyzed the contracts between petitioner and its three Hawaii-based distributors. The District Court's summarization of the salient features of the contract consumes two paragraphs of the memorandum decision. (R. 107-108.) Petitioner's errors in analyzing the distributor contracts and their relation to the decision are numerous:

1. Petitioner's argument that only a common-law agency relationship will support a claim of venue in Hawaii (petitioner's memorandum, page 15) is a plain misstatement of the applicable law;

2. Petitioner's argument that the respondent Judge erroneously found an agency relationship between its distributors and PCF is just not supported by the court's decision;

3. Petitioner fails to read the opinion wholly. It would prefer to isolate the PCF-distributor contracts and treat them as the sole basis on which the court below ruled. But plainly, the court considered the distributorship contracts as but one of several contacts with Hawaii.

1. No agency relationship is required to find the physically absent manufacturer transacting business in the forum.

In *B. J. Semel Associates, Inc. v. United Fireworks Mfg. Co., supra,* the defendant, as here, was not physically present in the forum. Venue in the District of Columbia was based upon defendant's shipment of merchandise, f.o.b. its Dayton, Ohio plant, into the District and two "goodwill" visits to the District of Columbia since 1962 by its officers. Finding that venue was properly laid in the District of Columbia, the Court said:

> We, however, are unable to believe that the spirit of *Scophony* comports with allowing the seller's shipping practices to determine his amenability to suit under Section 12. Were it otherwise, F.O.B. would always, and without more, compel the buyer to litigate on the seller's home grounds—the very result which Congress sought to avoid in Section 12.
>
> . . . Venue is not to be found in every case simply because of an isolated transaction of modest proportions. "Transacts business", as used in the statute, imports continuity—and continuity and total volume tend to be inter-acting. As said above, we think the

> volume of business was such here as to surmount any attack of a *de minimis* nature. And the wholly respectable proportions of this volume complete the picture which we think the record paints of a manufacturer who looked to the District of Columbia as one of its important markets and whose contacts with that market, although physically remote in a sense, were nonetheless continuous and substantial. 355 F.2d at 831-832.

Then, further reducing the term "transacts business" to "practical" and "everyday" language, the Court observed:

> Had an officer of appellee suddenly been asked, in a non-legal context, "Are you doing any business in the District of Columbia," his answer would, we surmise, have been "Yes." His interrogator would understand him to mean that at least one customer in the District was looked to for an important amount of purchases; and, the more practical a man of business such an interrogator was, the more he would have assumed that appellee was in close and continuous touch with such customer about their mutual business concerns. This is what Congress had in mind when it pondered the problem of venue in relation to private antitrust suits, and decided to give the injured party wider scope to sue at home. See United States v. Scophony Corp., *supra*. The exact limits of that scope may not be clearly fixed, but we think this appellee had, on the basis of the record before us, brought himself within them. 355 F.2d at 833.

The test then under *Semel* was not the manner in which defendant's goods find their way to customers in the chosen forum but whether there is continuous flow of a

significant volume of goods into the forum—regardless of how they get there.

In the instant case, it is not necessary to go as far as did the *Semel* court. Our case is much more closely akin to *Brandt v. Renfield Importers, Ltd.*, 278 F.2d 904 (8th Cir. 1960). In that case a group of retail liquor dealers sued distillers, distributors, wholesalers and other retailers under the Sherman and Robinson-Patman Acts. The distiller defendants sought dismissal for lack of venue. The particularly applicable contentions of the parties re venue are set out in the opinion:

> The appellants [plaintiffs] do not claim that the appellees have "agents" in Missouri directly carrying on the sale of appellees' products but their claim is that when appellees' business of selecting certain distributors in the district of suit and of selling their brands of liquor and causing them to be transported into the district to those distibutors for distribution there is "judged in its totality" it must be concluded that they each do transact some substantial business in the district of suit. Exhibitor's Service v. Abbey Rents, D.C., 135 F.Supp. 112. They contend that each of the appellees is transacting business in the district in such a sense as to establish the venue of the suit there although not present by agents carrying on business in such character and in such manner that each appellee is found therein, or is there amenable to local process—because each in fact in the ordinary and usual business or commercial sense transacts business there of substantial character. Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684. Appellants refer to the declaration of the Supreme Court concerning venue in antitrust cases in United States v. Scophony Corporation, 333

U.S. 795, 68 S.Ct. 855, 862, 92 L.Ed. 1091, that "the practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue" and insist that the business of appellees fully meets that test.
278 F.2d at 909.

After noting that

The record does not include the contracts between appellees and their distributors, but it is evident that the relationships are close, intimate, and of long standing, and cover by expression or implication much more than mere isolated bargains of sale of such and such liquor at such and such a price,

(278 F.2d at 910)

the Court states and rejects defendants' position:

Appellees stress that their distributors are independent contractors and such they may appear to be in the technical common law sense. But they are not independent like a casual customer would be who occasionally makes a purchase from a vendor. On the contrary, they are selected sole and exclusive distributors who apparently perform for the appellees every function of distributing appellees' products that agents hired and paid for the purpose could accomplish.

* * *

We think that in everyday business conception the district of suit served with appellees' products as it is, would be sharply contrasted with a district where appellees' products were not for sale or obtainable and where appellees transacted no business. The relations of the appellees with their distributors is too close and continuous for all the transacting of

> the business to be attributed in common understanding to the distributors and none to the appellees. 278 F.2d at 910.
>
> * * *
>
> The appellees describe their nationwide sales as made to wholesalers and distributors in the different states and press the doctrine of independent contractor to the point that it might be concluded that they do not transact business in any state except at their home offices. But we think that position is contrary to the teaching of Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684; (and other cases).

To the same effect see *Hartley & Parker, Inc. v. Florida Beverage Corporation,* 307 F.2d 916 (5th Cir. 1962), where the liquor distiller was not physically present in the District and its contacts were through wholesalers and goodwill visits and *Green v. U.S. Chewing Gum Mfg. Co.,* 224 F.2d 369 (5th Cir. 1955), where defendant was not physically present in the District but shipped goods into the District in response to mail orders.

In no case did any of these Courts of Appeals require a finding of agency between manufacturing-seller and its distributors. Indeed, they expressly found to the contrary. And it is quite interesting—perhaps amusing—that the *only* appellate court case cited by petitioner in support of its argument that sales through a distributor will not support venue against the manufacturer—*Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co.,* 304 F.2d 915 (1st Cir. 1962)—is *not* an antitrust case and was therefore decided under the general venue statute applicable to diversity cases and as to which the powerful

policy arguments applicable to antitrust cases are wholly absent.

2. The District Court found no agency.

But Judge Pence found no agency relationship because none was required. What his analysis did show, however, was that the relationship between petitioner and its distributors was a close and intimate one and that PCF's Hawaii distributors, under the terms of their respective contracts, perform for PCF every function of distribution that hired agents or employees could have accomplished. (See *Brandt v. Renfield,* 278 F.2d at 910.) In so concluding, Judge Pence would have been warranted—on those facts alone—in holding the venue was appropriately laid in Hawaii because the relation of PCF with its distributors "was too close and continuous for all the transacting of business to be attributed in common understanding to the distributors and none to the [petitioners]". 278 F.2d at 910.

3. Viewing the totality of the facts, petitioner was clearly within the forum.

But, as indicated above, Judge Pence looked to the totality of the facts. He found that in the 16-month period of time from March, 1964 through June, 1965 at least six trips were made by high echelon personnel of petitioner to Hawaii for the purpose of transacting business there. (R. 108.) And even petitioner's chief executive officer and board chairman admitted such business trips were made for goodwill or service and generally in response to distributors' requests. (R. 24.) Petitioner does not deny these trips. It just attempts to explain them away. It says

some were abortive (Petitioner's Memorandum, p. 22); but we know of no case that interpets "transacts business" to add the word "successfully". And petitioner says that the admitted trips to provide "assistance in our promotion of sales of Peterbilt trucks in the Hawaiian Islands" refers to distributors' sales, not its own. Can there be a difference?

And finally, there are two letters (R. 67-70) which clearly show that one of O'Neil's incorporators (Robert N. Larkin), then a resident of Hawaii, wrote to and received a reply from petitioner relating to the prospective Australian distributorship out of which this action arises. And two letters (R. 71-72) which show that Larkin, from Hawaii, communicated with his prospective business associates in Australia. Can it be seriously urged then that Hawaii was not *the* bridge between petitioner on the Mainland and respondent O'Neil in Australia and that Larkin's presence and activities in Hawaii brought the parties together to enter into the contract out of which the case arose.

The totality of these facts unquestionably then, supports the precise holding of the respondent Judge that petitioner "has carried on more than minimal business activities in the District of Hawaii" (R. 110) such that "this Court must find that defendant has been and is doing business in Hawaii within the purview of Clayton 12, and it is not unreasonable to compel the defendant to appear and answer in this forum". (R. 111.)

Were it otherwise, every manufacturer who transacts business through independent distributors and whose con-

tact with the forum is limited to goodwill and other legitimate business purpose trips could insulate itself from suit in any district where it does not have a plant or office. This result is so antithetical to the plain purpose of Section 12 of the Clayton Act, so inconsistent with the principles enunciated by this Court based upon earlier precedents of the Supreme Court, and so destructive of the utility of private antitrust cases as part of the enforcement program, that it should—now that the Court has decided to review this case by mandamus—be laid to rest finally and decisively. This Court has been presented with and has apparently accepted the opportunity to add its view to those of the Fifth, Eighth and District of Columbia Circuits, which now have virtually relegated the highly technical venue arguments to the scrap heap. Were this Court to take the present opportunity, it would, we submit, do much to discourage the wasteful and dilatory, and usually unsuccessful initial attacks on venue so frequently made in district courts.

Two "makeweight" arguments remain to be answered.

4. Petitioner's analysis of the Eastland case is wrong.

First is petitioner's contention that Judge Pence erred in considering evidence of petitioner's activities prior to the time the cause of action arose. Petitioner argues that Judge Pence ignored the *Eastland Construction* case in considering events which occurred prior to the accrual of the cause of action.[4] That argument might be tenable

[4]This is the first time we have seen the argument made that a Judge has "given little or no credit to the case" when he cites that case in support of a legal premise. (Petitioner's Memo., p. 27) See footnote 8 of Judge Pence's Opinion (R. 109).

if we were to excise footnote 10 of the *Eastland* opinion which in substance states that where a corporate defendant is at the time of filing of the complaint transacting business in the forum, then it is alternatively permissible to read 15 U.S.C. 22 in its literal present tense language. Thus the holding of *Eastland* was fashioned for and applicable to those situations envisioned by *Scophony* where the defendant has "retreated" or withdrawn after inflicting injury and before the complaint is filed. This conclusion is perfectly consistent with the articulate holding in *Eastland,* to wit:

> "We conclude that the requirements of section 12 are satisfied if when the cause of action accrued the corporate defendant transacted business in the district in which suit is filed". 358 F.2d at 782.

Nowhere does the opinion suggest that the present tense language *always* relates back to the time when the cause of action accrued.

5. Petitioner's tortured reading of Courtesy Chevrolet is inconsistent with Eastland and the Supreme Court cases on which Eastland is based.

Finally, there is petitioner's argument that because the alleged injury did not arise out of activities in Hawaii, venue cannot properly be laid in Hawaii. Stated more legalistically, petitioner contends that *Courtesy Chevrolet* necessarily incorporates the non-antitrust venue standards articulated by this Court in *L. C. Reeder Contractors of Arizona v. Higgins Industries, Inc.,* 265 F.2d 768 (9th Cir. 1958). This argument was made to and rejected by Judge Pence (who wrote the *Courtesy Chevrolet* opinion). Judge Pence pointed out that under Clayton 12 the cause

of action need not arise from activities within the forum and that this was so because venue standards under the antitrust laws were less stringent than in diversity cases (R. 109). Then Judge Pence observed that, although the *Reeder* standards were actually met in *Courtesy Chevrolet* (as a buttressing reason for reversal), *Courtesy* did not *require* that the *Reeder* standards be met.

Both observations are correct. This Court in *Eastland* made it clear beyond any question that Congress considered and rejected *limiting* venue in private antitrust actions to the place where the cause of action arises. This Court said of that proposal:

> "Congress did not adopt the proposed amendments. Instead, Congress added the 'transacts business' language to section 12. The Supreme Court concluded that Congress intended the 'place of injury' basis for venue, which was tendered in the rejected amendments, to be encompassed within the 'transacts business' language which was adopted in their stead." 358 F.2d at 781 (cited by Judge Pence for this proposition: R. 109).

See also *U. S. v. Scophony Corp.*, 333 U.S. 794 (1948), and *U. S. v. National City Lines*, 334 U.S. 573 (1948). Obviously then, "transacts business" means something broader than the place at which the injury is inflicted.

And a reading of *Courtesy Chevrolet* reveals that the finding of the *Reeder* standards there was not necessary to the result. Thus, footnote 9 of Judge Pence's decision below states:

> After the court had already determined that the acts of the defendant were sufficient to fulfill the venue requirements of Clayton § 12, it continued:

> "Similar to the holding of this court in *Mechanical Contractors* [*supra,* 342 F.2d 393] we here *also* 'think that the totality of the facts shown by this record satisfies the three tests laid down by us in L.D. Reeder Contractors of Arizona v. Higgins Industries, Inc., 9 Cir., 1959, 265 F.2d 768, and Kourkene v. American B. B. R. Inc., 9 Cir., 1963, 313 F.2d 769.' " (Emphasis added.) 344 F.2d 860, 866. (R. 110)

But even if we were to accept the notion that the cause of action must arise out of activities in the District in which it is brought, this case meets that standard. Judge Pence found on the basis of the letters referred to earlier (R. 67-72) that "the fundamentals of the distributorship contract of the parties out of which this action has arisen, were initially negotiated in Hawaii" (R. 110). That finding satisfies the second test of *Reeder* and brings this case within the even more stringent venue requirements governing non-antitrust cases.

For all of the reasons set forth above, this Court should deny mandamus as to the motions to dismiss and quash because venue was properly laid in Hawaii.

VII

RESPONDENT JUDGE PROPERLY EXERCISED HIS DISCRETION IN DENYING THE TRANSFER MOTION

A. Applicable Legal Standards.

A succinct statement of the law applicable to 28 U.S.C. 1404(a) transfer motions[5] is found in *Texas Gulf Sulphur Company v. Ritter,* 371 F.2d 145 (10th Cir. 1967):

> The transfer of pending civil cases from one district to another is governed by 28 U.S.C. § 1404(a) which provides "(a) for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The burden of establishing that the suit should be transferred is upon the movant and unless the evidence and the circumstances of the case are strongly in favor of the transfer the plaintiff's choice of forum should not be disturbed. The transfer lies within the sound judicial discretion of the trial judge and his determination should not be rejected unless the appellate court can say there has been a clear abuse of discretion. The circumstances of each particular case must be examined by the trial judge in the exercise of his discretionary power under section 1404(a) to order a transfer. Among the factors he should consider is the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the exist-

[5]We shall not discuss the transfer motion made under 28 U.S.C. 1406 which stands or falls on the propriety of venue in Hawaii.

> ence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical. 371 F.2d at 147.

The process of resolving a 1404(a) motion is "peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation". *Lykes Bros. Steamship Co. v. Sugarman,* 272 F.2d 679, 680 (2nd Cir. 1959). See also *Time, Inc. v. Manning,* 366 F.2d 690 (5th Cir. 1966).

The appropriate scope of review of this matter is whether or not the respondent Judge considered all of the relevant factors. If he "acted wisely and responsibly" *(Lykes Bros. Steamship Co. v. Sugarman, id.),* then this Court should deny mandamus.

B. The Respondent Judge Considered All of the Relevant Factors and Found That the Interest of Justice Would Not Be Served by Transfer.

Boiled down to its simplest form, petitioner's argument for transfer is this: because O'Neil cannot bring this case in Australia, which is the place of the injury, and therefore must travel to the United States in any event, it should be required to bring the case at the place most convenient to petitioner. In short, foreign-based corporations should be required to sue American defendants at their headquarters office.

No case, no concept of law or equity, no principle of comity requires the American judiciary to so discriminate against a foreign-based plaintiff seeking relief under the American antitrust laws. And on the particular facts of

this case, Judge Pence was quite correct in saying that petitioner had failed to demonstrate that the interest of justice would be served by transfer to Seattle.

Petitioner submitted affidavits showing that 45 potential witnesses resided in the greater Seattle, Washington, area. All but two of these were past or present employees of petitioner. Petitioner also argued that eleven additional potential witnesses resided in or about the San Francisco Bay Area and that trial in Seattle would be more convenient for these persons than trial in Hawaii. Petitioner's brief listed the position each potential witness held with the company. Petitioner also advanced the other stock argument used to support transfer motions, namely, that its documents were located in Seattle and in the San Francisco Bay Area. Finally, petitioner computed—on the basis that all 56 Mainland witnesses would testify at trial—approximate travel costs to transport them to Hawaii.

O'Neil submitted affidavits showing (1) that all of its personnel resided in Australia and that travel to Seattle would be more costly to them and make more difficult "commuting" to and from trial which might otherwise be possible from Hawaii; (2) that there were potential witnesses in Hawaii including Al Gould the former officer of petitioner with whom O'Neil and Larkin negotiated their original Peterbilt distributorship arrangements and whose representations to the plaintiff at that time have become important evidence and (3) that plaintiff's choice of forum was not the result of "forum shopping" but was the American court nearest to its home so as to minimize costs.

Judge Pence weighed all the equities. His extensive experience in the pre-trial and trial of antitrust cases is known to this Court. He knew that substantially all of the potential witnesses listed by petitioner were its past and retired employees and hence subject to its control. Petitioner failed to show a single instance of a live witness who would be *unavailable* to it at trial if trial were in Hawaii; its showing was limited *solely* to convenience and cost. Moreover, must an experienced Judge blindly accept the representation that some 54 witnesses employed by a defendant will testify at trial when there is probably no antitrust case in history in which such a record has been established? Is a Judge to be impressed by problems of document transportation with knowledge, for example, of the document-handling procedures set up in electrical equipment conspiracy cases and established by this respondent Judge in the *Western Concrete* and *Steel Pipe* Cases? Is a judge to insulate himself from the realities of life—as, for example, evidenced by Pre-Trial Order No. 1—Exhibit A hereto? The questions are rhetorical.

And by saying that "at this stage of the litigation it is impossible for this Court to ascertain with any definitive approximation the burden which defendant may incur", Judge Pence does not defer ruling; he states the obvious—that defendant's wildly exaggerated showing provides him with no sound basis for judging the *actual* rather than the *highly problematical* hardship which defendant may sustain by trial in Hawaii.

Mere increase in the cost of defense has never justified transfer and petitioner cites no case for such a proposi-

tion. See, for example, *Golconda Mining Co. v. Herlands,* 365 F.2d 856 (2nd Cir. 1966). Were it otherwise, every antitrust case would automatically be transferred to the headquarters office of the corporate defendant where the bulk of its officers and records are maintained. 15 U.S.C. 22 would soon be hollow to fall before the massive showing possible in every case where the defendant is not sued in its home district.

Correctly pointing out that the burden for showing the interest of justice would be served by transfer is on the moving party, Judge Pence, after evaluating the facts before him concluded that petitioner has not met its burden. He met and discussed each point made by petitioner in its transfer motion. He correctly stated the applicable principles of law. He reached a result which was anything but arbitrary. If, on this record, this Court can conclude that there has been a usurpation of judicial power or an abuse of discretion, it will, we respectfully suggest, be establishing a wholly new and different standard applicable solely to foreign corporations.

Finally, petitioner makes much of O'Neil's "neutral ball park" argument. It ignores two facts. First that the plaintiff's choice of forum usually permits it to pick the district in which it is located. Thus, the law permits the plaintiff to select a forum for trial which is conceptually favorable to it, not neutral. Why, then, should petitioner be offended at having to litigate outside its home arena? This is the tradition in antitrust cases.

Secondly, the cases which petitioner cites re "neutral ground" are wholly inapplicable: *Paragon-Revolute Corp. v. C. F. Pease Co.,* 120 F.Supp 488 (Del. 1954); *Pepsi-Cola*

Co. v. Dr. Pepper Co., 214 F.Supp. 377 (W.D. Pa. 1963); *River Company, Inc. v. Texas Eastern Transmission Corp.*, 1954 Trade Cases ¶67,840 (S.D.N.Y. 1954); and *General Felt Products Co. v. Allen Industries*, 20 F.Supp. 491 (Del. 1954), cited by petitioner in its Memorandum (pp. 34-5) as rejecting the "neutral ground" forum, are all distinguishable. Each involved an American company which could have sued in its home district, but voluntarily chose to leave. This plaintiff *could not have sued in Australia because no court there has jurisdiction of a claim under the American antitrust laws.* A foreign-based plaintiff suing in the closest court to its home must, therefore, be treated as the equivalent of having sued in its home district. If any other rule is adopted, foreign corporations will necessarily find themselves in a position less favorable than their American-based counterparts. No rule of law or concept of equity justifies or requires such discriminatory treatment.

We respectfully submit that unless the Court is prepared to adopt a new, different and discriminatory standard applicable to foreign corporations, then it must deny mandamus as to the denial of the transfer motion.

VIII

CONCLUSION

For the foregoing reasons this Court should deny the prayed for writ of mandamus.

Dated, March 12, 1968.

JOSEPH L. ALIOTO,
MAXWELL M. BLECHER,

DAMON, SHIGEKANE & CHAR,
VERNON F. L. CHAR,

Attorneys for Respondents L. C. O'Neil Trucks Pty. Limited, Real Party in Interest, and by Special Designation for Honorable Martin Pence, United States District Judge, District of Hawaii.

Of Counsel:
MARQUIS JACKSON.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAXWELL M. BLECHER,
Attorney for said Respondents.

(Exhibits Follow)

Exhibits

Exhibit A

In the United States District Court
for the District of Hawaii

No. 2724

L. C. O'Neil Trucks Pty. Limited, (formerly Peterbilt (Aust.) Pty. Limited,
Plaintiff,

vs.

Pacific Car and Foundry Company,
Defendant.

PRE-TRIAL ORDER NO. 1

Plaintiff filed with its complaint a motion for the production of documents under Rule 34. It later filed a notice of taking certain depositions in Seattle on December 5-7, 1967. Defendant filed a motion to quash said notice, filed its own notice of taking depositions and filed its own motion for production under Rule 34. Defendant also filed a motion to quash return of summons, or in lieu thereof, to dismiss or transfer, pursuant to 28 U.S.C. §1406(a), or, if said motion be denied, for change of venue under 28 U.S.C. §1404(a), which motion was argued before the undersigned judge on October 23, 1967, and is still pending.

In view of the pendency of defendant's motion to dismiss or for change of venue aforesaid and in order to give counsel for the parties an opportunity to agree upon pending discovery matters, ruling on the various motions for discovery was reserved. Counsel have now conferred regarding said matters of discovery and their agreement is embodied in this order, which counsel have approved for entry. This order is without prejudice to defendant's pending motion to quash return of summons, etc.:

1. On or before December 5, 1967 at Seattle, Washington, or Newark, California, or both, as it may elect, defendant shall produce for inspection and/or copying the following documents called for in Appendix A of plaintiff's Motion to Produce, for the period from January 1, 1961 through and including April 30, 1967:

(a) Documents sufficient to show (preferably in diagrammatic form):

(i) The corporate structure of PCF;

(ii) The division structure of Peterbilt and Kenworth, and

(iii) The relationship of the divisions to each other and to PCF.

(b) Such documents as will reflect for PCF, Peterbilt and Kenworth, separately, the names of persons having management authority and how such authority is divided functionally and/or geographically;

(c) All reports to stockholders, including interim and special reports;

(d) All memoranda and other documentation relating to, discussing, analyzing or commenting upon the construction of a truck manufacturing or assembling plant in Australia;

(e) All correspondence and contracts with plaintiff and all notes, memoranda, letters or other documents discussing plaintiff or memorializing oral conversations with or about plaintiff;

(f) All memoranda, correspondence or other documentation pertaining to the manufacture, assembly, or marketing of any trucks in Australia;

(g) All market studies, analyses, sales projections or similar documents regarding the manufacture, assembly or distribution of trucks in Australia;

(h) Books, documents or records sufficient to show the terms and conditions of sale by Kenworth to any of its distributors or dealers in Australia;

(i) Correspondence, bulletins, circulars, memoranda or other documents sufficient to show, with relationship to the marketing of trucks in Australia, (1) the general scope of authority of the officers of Peterbilt and Kenworth, (2) the general relationship, if any, of Peterbilt and Kenworth to each other in terms of engineering, manufacturing, sales, administration and finance, personnel, distributors and/or dealers, or any of these, (3) the general relationship of Peterbilt and Kenworth and their respective management to PCF with respect to engineering, manufacturing, sales, administration and finance, personnel, distributors and/or dealers, of any of these;

(j) All policy statements, letters of general distribution, bulletins, circulars, or the like, sent to (1) Peterbilt and (2) Kenworth distributors and/or dealers in Australia;

(k) Form of each distribution and dealers contract used in Australia by (1) Peterbilt and (2) Kenworth;

(l) All minutes or tape recordings of Peterbilt distributor meetings attended by a representative of plaintiff or to which plaintiff was invited;

(m) All general sales directives emanating from PCF to Kenworth and Peterbilt with respect to the marketing of trucks in Australia and all general sales directives from Kenworth and Peterbilt management to subordinate sales personnel, relating to the marketing of trucks in Australia.

2. On or before December 5, 1967, at the offices of its counsel, Joseph L. Alioto and Maxwell M. Blecher, 111 Sutter Street, San Francisco, California 94104, plaintiff shall produce for inspection and copying all of the documents called for by defendant's Motion to Produce except that the period covered by such production shall be from January 1, 1961 through and including April 30, 1967.

3. This order shall be without prejudice to the right of either party to seek production of those documents originally called for but not subject to production by this order and without prejudice to the right of either party to seek the production of other documents or to oppose and resist such further production requests by the other party.

4. On January 15, 1968 at 9:30 A.M. plaintiff will produce for deposition at 1610 Washington Building, Seattle, Washington, Laurence C. O'Neil and Richard Baker. Immediately upon the conclusion of the depositions of Messrs. O'Neil and Baker, or at 1:30 P.M. on January 17, 1968, if the depositions are not concluded at that time, defendant will produce for deposition at 1610 Washington Building, Seattle, Washington, Donald F. Pennell and Robert D. O'Brien. The depositions of Pennell and O'Brien shall continue until January 19, 1968 at 4:30 P.M.

It is agreed that the taking of the four depositions aforesaid in Seattle during the week of January 15, 1968 by the respective parties shall be without prejudice to the continuation of any of the said depositions upon reasonable notice.

Dated, December 6, 1967

Approved for entry:

Joseph L. Alioto
Maxwell M. Blecher
Vernon F. L. Char
/s/ Maxwell M. Blecher
Attorneys for Plaintiff

Helsell, Paul, Fetterman, Todd & Hokanson
Richard S. White
Roy A. Vitousek, Jr.
/s/ Richard S. White
Attorneys for Defendant

It is so ordered this ..... day of December, 1967.

.....

United States District Judge

Exhibit B

[Title of Court and Cause]

MEMORANDUM SUBMITTING PROPOSED PRE-TRIAL ORDERS NOS. 2 AND 3

Lodged herewith are proposed Pre-Trial Orders Nos. 2 and 3 each of which is largely self-explanatory.

The proposed Rule 37 motion referred to in Pre-Trial Order No. 3 deals with the subjects there indicated based upon the failure of Robert O'Brien, Chairman of the Board of defendant, acting upon the advice of counsel, to respond to questions in his deposition taken in Seattle on January 18-19. Because the transcript of that deposition has not yet been received, it is impossible to submit the motion at this time. Plaintiff will be prepared to do so very shortly after receipt of the transcript.

Taken together, Pre-Trial Orders Nos. 2 and 3 map out time sequences and orderly processes leading to the trial of the above case on December 5, 1968. We do not regard this as a "bargaining" proposal but think we have been extraordinarily liberal in having allowed for commitments of both plaintiff's and defendant's counsel in establishing this sequence of events which makes a December trial date feasible. In short, we regard this as a realistic and concrete proposal for the orderly disposition of this litigation and respectfully urge the Court to consider the advantages of now fixing such a trial date.

Dated:

Respectfully submitted,

Joseph L. Alioto,
Maxwell M. Blecher,
/s/ Maxwell M. Blecher,
Vernon F. L. Char,
Damon, Shigekane & Char,
Attorneys for Plaintiff.

[Title of Court and Cause]

PROPOSED PRE-TRIAL ORDER NO. 3

A pre-trial conference having been held on March 29, 1968, counsel having been heard and due deliberation having been had,

It is hereby ordered:

1. Unless the Court shall otherwise order, for good cause shown, all discovery in the above case shall be initiated not later than August 30, 1968;

2. (a) On or before September 30, 1968, plaintiff shall file a written trial brief containing separately numbered paragraphs and setting forth:

(i) The facts which plaintiff expects to prove in support of each claim for relief, distinguishing between those facts which plaintiff contends, on the basis of the answers, or otherwise, are admitted and those which are contested;

(ii) The legal issues, contentions, and supporting authorities related to each claim for relief, including plaintiff's contentions as to its theory and measure of damages pertaining to each claim and plaintiff's contentions as to the burden of proof on each issue. Plaintiff's contentions as to each plaintiff's theory and measure of damages should include a detailed narrative statement of all expert testimony plaintiff proposes to introduce at trial.

(b) On or before September 30, 1968, plaintiff shall designate those portions of any deposition which it expects to read into testimony at the trial and shall also designate those exhibits to the deposition on which it intends to rely or introduce into evidence at trial.

3. (a) On or before November 1, 1968, defendant shall file a written brief containing separately numbered paragraphs and setting forth:

(i) The facts which defendant expects to prove in defense of each claim for relief, distinguishing between those facts which defendant contends, on the basis of the complaint, plaintiff's brief or otherwise, are admitted and those which are contested;

(ii) The legal issues, contentions, and supporting authorities related to the defense of each claim for relief, including defendant's contentions as to the theory and measure of damages pertaining to each claim and defendant's contentions as to the burden of proof on each issue. Defendant's contentions as to plaintiff's theory and measure of damages should include a detailed narrative statement of all expert testimony defendant proposes to introduce at trial.

(b) On or before November 1, 1968, each defendant shall counter-designate those portions of any deposition which it expects to read into testimony at the trial and shall also counter-designate those exhibits to any deposition on which it intends to rely or introduce into evidence at the trial.

4. (a) On or before November 12, 1968, plaintiff may, if it desires, file a detailed written reply brief containing separately numbered paragraphs and setting forth:

(i) The facts, if any, plaintiff expects to prove in rebutting any affirmative matter raised by defendant in a brief filed pursuant to paragraph 3 hereof, distinguishing between those facts which plaintiff contends, on the basis of the answers, defendant's briefs

or otherwise, are admitted and those which are contested;

(ii) The legal issues, contentions and supporting authorities, if any, related to the rebuttal of any affirmative matter raised by defendant in a brief filed pursuant to paragraph 3 hereof, including plaintiff's contentions as to the party bearing the burden of proof on each issue.

(b) On or before November 12, 1968, plaintiff may, if it desires, designate those portions of any deposition which it expects to read into testimony at the trial and designate those exhibits to any deposition on which it intends to rely or introduce into evidence at the trial based upon the counter-designation by defendant.

5. Any factual issue, legal issue, contention, claim or defense not set forth in detail as provided in paragraphs 3 to 5 shall be deemed abandoned, uncontroverted, or withdrawn in further proceedings, the pleadings and other papers on file herein to the contrary notwithstanding, unless the Court shall otherwise authorize in the interest of justice; provided, however, that this exclusion shall not require detailed statements of witnesses' testimony and provided further that this exclusion shall not apply to evidence introduced by one party which is relevant to the testimony of a witness produced by the other party.

6. On or before November 15, 1968, each party shall designate all documents, graphs, charts or other exhibits on which it intends to rely or introduce at the trial.

7. On or before November 25, 1968 each party shall designate any additional documents, graphs, charts or

other exhibits on which they intend to rely or introduce into evidence at the trial in rebuttal of the documents designated in the preceding paragraph.

8. On or before November 15, 1968, plaintiff and defendant shall file:

(a) Witness lists, indicating whether each witness will be presented by live or deposition testimony;

(b) Proposed questions for the *voir dire* examination;

(c) Draft of proposed instructions to the jury on the law of the case;

(d) Proposed special interrogatories to the jury, if any;

(e) Objections to said designated deposition testimony and/or exhibits;

9. A pre-trial conference is set for December 2, 1968 at which time final trial plans will be developed and a final pre-trial order formulated. Among other things, the following matters will be considered:

(a) The *voir dire* examination;

(b) Possibility of stipulating to facts;

(c) The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;

(d) Jury instructions and special interrogatories;

(e) The days and hours of the week during which Court will be conducted;

(f) Rulings on any objections to designated deposition testimony and documentary evidence where possible.

10. Trial of the above case is set to commence on December 5, 1968 at 9:00 a.m.

Dated:

.....

United States District Judge

Approved as to form:

Maxwell M. Blecher
Attorney for Plaintiff

Richard White
Attorney for Defendant

[Title of Court and Cause]

PROPOSED PRE-TRIAL ORDER NO. 2

A pre-trial conference is hereby set for March 29, 1968 at a place to be fixed by the Court. At said pre-trial conference, the Court will hear argument on:

1. Plaintiff's proposed Rule 37 motion seeking a determination on:
   (a) defendant's claim of privilege and
   (b) defendant's refusal to furnish information respecting the payment of goodwill on the purchase of distributorships.

2. All objections to (a) motions to produce or (b) interrogatories outstanding as of said time.

3. Proposals regarding future scheduling.

Dated:

.....

United States District Judge

Exhibit C

[Title of Court and Cause]

NOTICE OF MOTION TO PRODUCE UNDER RULE 34 OF THE FEDERAL RULES OF CIVIL PROCEDURE

To: Pacific Car and Foundry Company and its counsel of record:

Please take notice that the undersigned attorneys for plaintiff will bring the attached motion for hearing before this Court on March 29, 1968 at 10:00 a.m. or as soon as counsel may be heard and at such place as the Court may designate, with respect to any matters of production sought.

Dated: January 23, 1968.

Joseph L. Alioto,
Maxwell M. Blecher,
/s/ Maxwell M. Blecher,
Vernon F. L. Char,
Damon, Shigekane & Char,
Attorneys for Plaintiff.

PLAINTIFF'S MOTION TO PRODUCE UNDER RULE 34 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Plaintiff hereby moves, pursuant to Rule 34 of the Federal Rules of Civil Procedure, for an order:

1. Requiring defendant to produce and permit the inspection and copying or photographing, by or on behalf of the plaintiff, of the documents listed in Appendix A of this motion, which documents are in the possession, custody and control of said defendant and contain and constitute evidence relevant and material to the matters and issues involved in this action as is more fully shown in the accompanying memorandum and affidavit of Maxwell M. Blecher.

2. Requiring that said documents be produced in the Seattle, Washington offices of defendant's counsel of record within twenty days after the entry of the order and from day to day thereafter.

3. This motion is based on the pleadings and files in this case and the memorandum in support of plaintiff's motion for the production of documents pursuant to Rule 34 and the affidavit of Maxwell M. Blecher.

Dated: January 23, 1968.

Joseph L. Alioto,
Maxwell M. Blecher,
/s/ Maxwell M. Blecher,
Vernon F. L. Char,
Damon, Shigekane & Char,
Attorneys for Plaintiff.

I

DEFINITION OF TERMS

As used in this Appendix, the following terms have the meanings indicated:

1. "Documents" refer to all written or graphic matter, however produced or reproduced, of every kind and description in the actual or constructive possession, custody, care or control of the addressee, including but not limited to originals (or copies where originals are unavailable) of: correspondence, telegrams, notes or sound recordings of any type of personal or telephone conversations or of meetings or conferences, minutes of directors' or committee meetings, memoranda, interoffice communications, reports, contracts, licenses, agreements, ledgers, books of account, vouchers, bank checks, invoices, charge slips, hotel charges, receipts, freight bills, working papers, statistical reports, cost sheets, stenographers' notebooks, desk calendars, appointment books, diaries, timesheets or logs, or papers pertaining to any of the foregoing however denominated by the addressee.

2. "PCF" means Pacific Car and Foundry.

3. "Heavy duty trucks" means off-highway as well as on-highway heavy duty vehicles.

4. "Plaintiff" as used herein means not only the named plaintiff but its predecessors and any of the officers, directors, agents or employees thereof purporting to act for them.

5. The period of time for which documents are requested unless otherwise stated extends from January 1, 1958, to date.

II

DESCRIPTION OF DOCUMENTS

1. All documents that evidence each acquisition made by PCF of any individual relating to the partnership or corporation engaged in the manufacture and/or assembling of heavy duty trucks or any component part used in manufacturing and/or assembling a heavy duty truck;

2. All documents discussing, analyzing, commenting upon, such acquisitions, including, but not limited to, any exchange of documents between the acquiring company and the acquired manufacturer and/or assembling plant;

3. All documents discussing the advantages or disadvantages of acquiring such manufacturing plant and/or assembling plant;

4. All documents showing the market value of the stock of each corporation manufacturing plant and/or assembly plant acquired by your company and the price you paid for such stock.

5. All documents relating to the establishment of Donald Pennell as Vice President in charge of co-ordinating the Kenworth and Peterbilt Divisions of PCF, including, but not limited to, documents discussing the reasons for establishing such an office, who made this decision, and what this officer's duties are.

6. All profit and loss statements of Kenworth and Peterbilt on a plant-by-plant basis. If such records are not kept on a plant-by-plant basis, then such profit and loss statements for the entire operations of both Kenworth and Peterbilt respectively.

7. All documents showing, or undertaking to show, or which discuss or relate to:

(a) Peterbilt's relative share of the heavy duty truck market

(i) domestically and (ii) internationally;

(b) Kenworth's relative share of its heavy duty truck market

(i) domestically and (ii) internationally;

(c) The total market share of both Peterbilt and Kenworth

(i) domestically and (ii) internationally

8. The capital budgets submitted by Peterbilt and Kenworth for the years 1958 through 1967, inclusive, and the action of PCF taken thereon.

9. All documents analyzing, commenting on or discussing, in whole or in part, the anticipated or actual construction by any of your company's competitors of a heavy duty truck plant on the west coast.

10. All documents, through 1967, relating, in whole or in part, to the establishment of a manufacturing plant and/or assembly plant in Australia, including, but not limited to, all documents submitted by any officer, director or other employee discussing the advantages or disadvantages of building such a plant in Australia and all documents showing the actual decision made concerning such plant and who made this decision.

11. All expense account vouchers and records of Robert O'Brien, Chairman of the Board of PCF.

12. All analyses or studies submitted to your company by the R. L. Polk Company.

13. All documents showing the payment for, commenting on, or discussing in whole or in part, the reason for paying for the goodwill or other intangible assets of any distributor of your trucks when such distributorship was purchased or sold by your company.

[Title of Court and Cause]

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO PRODUCE

I

STATEMENT OF THE CASE

On August 31, 1967, plaintiff L. C. O'Neil Trucks Pty., Ltd. (hereafter "O'Neil Trucks"), a cancelled distributor of heavy duty trucks, filed a complaint against Pacific Car and Foundry Company (hereafter "PCF"), plaintiff's former supplier. Plaintiff charged the defendant with participation in a combination and conspiracy in restraint of trade and attempt to monopolize in violation of Sections 1 and 2 of the Sherman Act. Concurrent with the filing of its complaint, plaintiff filed a Motion for the production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure. Defendant produced certain documents as designated in Pre-Trial Order No. 1 per agreement with plaintiff. On the basis of the documents produced and certain depositions taken, plaintiff seeks further document production.

II

APPLICABLE RULE AND PRECEDENTS

Rule 34 of the Federal Rules of Civil Procedure provides as follows:

> "* * * Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the Court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control; or (a) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

Under Rule 34, the moving party is required to make a showing of "good cause." This requirement is interpreted to mean that the Court must be satisfied that the production of the requested documents is necessary to enable the party to prepare his case, or that it will facilitate proof or progress at the trial. *Hickman v. Taylor,* 329 U.S. 495 (1947); *United States v. Five Cases,*

9 F.R.D. 81 (D.Conn. 1949), aff'd. 179 F.2d 519 (2 Cir.) cert. denied, 339 U.S. 963 (1950); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958).

The scope of examination permitted under Rule 34 is as broad as the scope of inquiry by deposition under Rule 26(b) or by interrogatories pursuant to Rule 33. As is the case with all discovery rules, Rule 34 is to be liberally construed. *Hickman v. Taylor, supra.*

As pointed out hereafter, all documents requested either contain or constitute or are likely to lead to evidence relevant and material to the matters and issues herein or are relevant to the subject matter involved in this action. The requested documents therefore come within the scope of production permitted under Rule 34.

III

GOOD CAUSE EXISTS FOR THE PRODUCTION OF THE DOCUMENTS SOUGHT

Plaintiff has alleged, *inter alia,* that defendant has, in violation of Section 2 of the Sherman Act, combined and conspired to monopolize, unilaterally attempted to monopolize and actually monopolize the export of heavy duty trucks from the United States to Australia.[1]

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[1]The combination charge rests alternatively, but not inconsistently, on (1) an *Hawaiian Oke* divisions conspiracy and (2) a PCF-Cameron conspiracy, either or both. We do not, however, disclaim the possibility of a PCF-competitor conspiracy. (See Paragraph 11 of the within motion.) The "attempt" charge renders the "division" theory moot. At the moment, little evidence is available to support the actual monopolization theory, which will probably be abandoned pre-trial.

Because we do not expect defendant to quarrel substantially with the *facts* (as distinguished from the inferences to be drawn therefrom) set forth hereinafter, we shall not—at this stage—undertake to document this recitation.

Both Kenworth and Peterbilt (the autonomous, competitive divisions of defendant PCF) manufacture at Seattle and Newark, California, respectively, diesel powered 33,000 lb. gross weight, heavy duty trucks. Kenworth entered the Australian market in 1962 by the appointment of Cameron as its exclusive distributor and shipped trucks to that country from its manufacturing facility in Seattle. In 1963 Peterbilt, without any prior export trade experience and never having produced a right-hand drive truck, undertook to enter the Australian market shipping trucks to that country from its Newark, California plant. No truck of the Peterbilt-Kenworth specification was then produced or even sold in Australia, though, of course, "heavy duty" trucks of inferior performance and lower price were available and sold to service the heavy duty truck market. While Mack and International Harvester assembled such trucks in Australia they were shipped in "knocked down" condition from manufacturing plants in the United States. Defendant recognized the competitive advantage of having a West Coast plant from which a truck manufacturer could ship to Australia. Defendant also recognized the vast potential market for its heavy duty truck in Australia. Finally, defendant recognized that the first American manufacturer who could economically justify a manufacturing—as opposed to assembly—facility in Australia would gain not only "a lion's share

of the market'' but could indeed cause importing competitors to ''withdraw'' from the market and ''discourage entry'' by others.

After Kenworth and Peterbilt competed, one against the other, for a period of two and a half years, each achieving results beyond the expectations of the defendant, a decision was made to discontinue importing Peterbilt into Australia in favor of building a Kenworth manufacturing facility in that country. Accordingly, plaintiff was ''transferred'' from its Peterbilt distributorship to a Kenworth distributorship. This decision was made knowing that the Australian Government was in the midst of an inquiry to adjust tariff rates on heavy duty trucks the result of which could have, and actually did, render the building of a plant in Australia economically unfeasible. After one year as a Kenworth distributor competing with the prior and still existing Kenworth distributor, defendant purchased the assets of Cameron, paying an amount over and above the asset value of good will, and proceeded to terminate plaintiff, thus leaving defendant with a ''company branch'' in Australia to reap double profits by plucking the fruit from the trees planted by the distributors.

All this sequence of events was preceded by the 1958 acquisition of Peterbilt Motor Company, an independent producer, by PCF which then operated Kenworth, which, according to the evidence, was then the largest selling truck in its class in the Western United States. Against this background and for the reasons briefly set forth below, each of the paragraphs of plaintiff's motion calls for documents either evidentiary in themselves or likely to lead to the discovery of admissible evidence.

Paragraphs 1 and 2 of Part II of Appendix A (hereafter referred to only by paragraph) seek documents relating to acquisition by PCF of heavy duty truck manufacturing and/or assembling plants and acquisitions of plants that produce component parts for such trucks. Paragraph 3 seeks documents relating to the advantages and/or disadvantages of acquiring such plants. These documents, largely dealing with the Peterbilt acquisition by PCF, relate to the monopolization charge first on the West Coast, from which the expansion Westward originated.

Paragraph 4 seeks documents showing the value of any plant purchased by PCF and the price paid therefor. These documents, again really limited to the Peterbilt acquisitions, are relevant to the Sherman 2 allegations of the complaint especially where they seek to confirm rumors that the price paid by PCF far exceeded the value of the plant purchased.

Paragraph 5 seeks documents relating to the establishment of Donald Pennell as the Vice President in charge of co-ordinating the Kenworth and Peterbilt divisions of PCF. These documents are relevant on the "divisions" theory and also as general background.

Paragraph 6 seeks profit and loss statements of the truck divisions. These documents, showing profit rate and comparative profits, are relevant to the Sherman 2 allegations of the complaint and may help to explain the decisions re building of a Kenworth plant in Australia while Peterbilt expanded into the Eastern United States.

Paragraph 7 seeks documents showing the relative share of the heavy duty truck market held by the divi-

sions of PCF. These documents are very likely to contain or constitute admissible evidence on the Section 2 charge.

Paragraph 8 seeks the capital budgets submitted by the Peterbilt and Kenworth divisions of PCF and the action taken by PCF regarding such budgets. These documents are relevant on the "divisions" theory. They should also reveal profit objectives relevant to the Sherman 2 charge.

Paragraph 9 seeks documents relating to PCF's investigation into what plants its competitors were operating and planning to operate on the West Coast. This information is relevant on both the Sherman 1 and 2 allegations.

Paragraph 10 seeks documents post-plaintiff's termination relating to the establishment of a manufacturing plant in Australia. These documents should explain why the Kenworth plant was never built.

Paragraph 11 seeks the expense vouchers of Robert O'Brien. These documents are relevant to show where and with whom Mr. O'Brien has gone. This information is obviously relevant on the issue of conspiracy.

Paragraph 12 seeks the studies of R. L. Polk Co. These documents contain "market share" facts re heavy duty trucks in the United States and have obvious relevancy as with paragraph 7 documents.

Paragraph 13 seeks documents showing all payments made by PCF for good will when it purchased any distributorship of heavy duty trucks. Such information is relevant on the issue of damages and may also, as relates to Cameron, reflect a guilty state of mind.

IV

CONCLUSION

For the above reasons, plaintiff respectfully requests that this Court grant plaintiff's Motion in its entirety.

Dated: January 29, 1968.

Joseph L. Alioto,
Maxwell M. Blecher,
Francis O. Scarpulla,
By /s/ Maxwell M. Blecher,

Damon, Shigekane & Char,
By.....,
Attorneys for Plaintiff.

Of Counsel
Marquis Jackson
32-34 Bridge Street
Sydney, Australia

State of California
City and County of San Francisco—ss.

Affidavit of Maxwell M. Blecher in Support of Motion to Produce Under Rule 34

Maxwell M. Blecher, being first duly sworn, deposes and says as follows:

1. That he is an attorney at law admitted to practice before all courts of the State of California and before this Court and is one of the attorneys for plaintiff in this case;

2. That the documents described in Appendix A are relevant and material to the issues in this case for the reasons set forth in the accompanying memorandum;

3. That the factual representations made in the accompanying Memorandum of Points and Authorities are true of my knowledge and belief and that memorandum is incorporated herein by reference.

4. That the pleadings, records and files in this action are incorporated herein by reference.

Dated: January 29, 1968.

/s/ Maxwell M. Blecher
Maxwell M. Blecher

Subscribed and sworn to before me this 29th day of January, 1968.

(Seal) Margaret Rogers,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires April 23, 1969.

Exhibit D

[Title of Court and Cause]

PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT SERVED BY PLAINTIFF PURSUANT TO RULE 33, FEDERAL RULES OF CIVIL PROCEDURE

To: The defendant Pacific Car and Foundry Company and its counsel of record.

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, L. C. O'Neil Trucks Pty. Limited, plaintiff herein, hereby serves upon defendant the following interrogatories to be answered fully and separately in writing and under oath as provided in Rule 33.

1. List the name and address of each plant owned by your company that manufactures and/or assembles heavy duty trucks, stating as to each whether it is a manufacturing plant or an assembling plant, and the date on which your company acquired such operation.

2. List the name and address of each plant owned by your company that manufactures any component part used in manufacturing or assembling a heavy duty truck, and state the date on which your company acquired such operation.

3. For the period January 1, 1960-December 31, 1967 list the name and address of every wholly-owned Peterbilt or Kenworth distributor outlet operated by your company, the date on which such operation began doing business as your outlet, the date on which it ceased being operated as your wholly-owned outlet.

4. For each outlet listed in response to the preceding interrogatory, state the dollar amount, if any, separately allocated by you on the purchase or sale of any such outlet to "goodwill" or "going concern value" or any other similar but differently designated asset.

5. List the situs of every plant that manufactures and/or assembles heavy duty trucks which is: (a) presently in operation, and give the date that such plant began operating; (b) under construction, and give the date on which construction began; (c) proposed for future operation; (d) closed, and the date on which such plant closed.

6. For each plant indicated in answer to the preceding interrogatory, state: (a) the date on which the decision was made to begin assembling heavy duty trucks at that particular location and who made this decision; (b) the date on which the decision was made to begin building such plant and who made that decision; (c) the date on which the decision was made to investigate the possibility of assembling heavy duty trucks at the particular proposed situs and who made this decision; (d) the date on which the decision was made to close down each plant, and who made that decision.

7. List the author, addressee, date and subject matter of each document covered by Pre-Trial Order No. 1 the production of which was withheld by you under a claim of attorney-client privilege or attorney's work product.

8. For each year, separately, from 1958 through 1966, list each city in the United States in which (a) Peterbilt

had one or more distributors (b) Kenworth had one or more distributors.

Dated: January 26, 1968

Joseph L. Alioto,
Maxwell M. Blecher,
/s/ Maxwell M. Blecher,
Damon & Shigekane,
Vernon F. L. Char,
Attorneys for Plaintiff.

Exhibit E

[Title of Court and Cause]

NOTICE OF TAKING DEPOSITIONS

To: Defendant and its counsel of record:

Please take notice that counsel for plaintiff will take the depositions of the following officers at the times and places indicated:

Al Gould Offices of Damon, Shigekane & Char 333 Queen St., Honolulu, Hawaii	May 13, 1968 9:30 a.m.
R. E. McGilvra Office of Marquis Jackson 32-34 Bridge Street, Sydney, Australia	May 17, 1968* 9:30 a.m.
Ed Cameron Office of Marquis Jackson 32-34 Bridge Street, Sydney, Australia	May 17, 1968* 2:00 p.m.
Robert Larkin Offices of Richard White, Helsell, Paul, Fetterman, Todd & Hokhansen, Washington Bldg., Seattle, Washington	June 6, 1968 9:30 a.m.
W. Gross Offices of Richard White, Helsell, Paul, Fetterman, Todd & Hokhansen, Washington Bldg., Seattle, Washington	June 7, 1968 9:30 a.m.
J. Grant Offices of Richard White, Helsell, Paul, Fetterman, Todd & Hokhansen, Washington Bldg., Seattle, Washington	June 7, 1968 1:30 p.m.

*Australian date and time.

Said depositions will be upon oral examination pursuant to the provisions of the Federal Rules of Civil Pro-

cedure before a Notary Public or some other person duly authorized to administer oaths and take depositions. Said depositions will continue from day to day until completed. You are invited to attend and examine.

Dated: January 24, 1968.

Joseph L. Alioto,
Maxwell M. Blecher,
/s/ Maxwell M. Blecher,
Vernon F. L. Char,
Damon, Shigekane & Char,
Attorneys for Plaintiff.